in any such other share, either in his or their own right or in a fiduciary capacity."

The opening words of this section clearly indicate that the "undivided share" refers to the proceeds and not to the land and that the proceeds are from the sale of land directed to be sold, presumably by the trust instrument or order of the court. In the instant case the trust instrument did not direct nor was there any order of court directing the infant's land to be sold. On the contrary the trust instrument expressly requires the land to be transferred to the infant and directs it to be registered in her name on her attaining the age of majority. In any event the power conferred by this section applies only so far as a contrary intention is not expressed in the trust instrument and has effect subject to the provisions expressed therein. In commenting on the applicability of this section 26 (English section 24), 26 *Halsbury's* Statutes of England 2nd Ed. says that: —

"The power conferred by this section applies to trusts, executorships and administratorships, whether created before or after the commencement of this Act, and is in addition to powers conferred by the instrument, if any, creating the trust but applies if and so far only as a contrary intention is not expressed in that instrument and has effect subject to the terms thereof;"

Section 2(2) of our Trustee Ordinance 1949 expressly limits that: —

"The power conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

I am therefore of the opinion that the instant application does not fall within the four corners of section 26 of the Trustee Ordinance 1949 because a contrary intention is expressed in the trust deed.

My attention was also drawn to section 57 of the Trustee Ordinance 1949. The relevant parts of subsection (1) are as follows: —

"An order under this Ordinance ... concerning any interest in land ... subject to a trust may be made on the application of any person beneficially interested in the land ... whether under disability or not or on the application of any person duly appointed trustee thereof."

In the instant case, the infant's ¼ share of the land is subject to the trust but not the applicant's share, and this application to sell the infant's land is not made by the infant who is beneficially interested nor by the trustee. Subsection (2) deals with land subject to a charge.

In my view this section 57 also does not apply to the instant application.

I am fully satisfied that in the instant case there is no evidence to show that it is a case of maintenance or salvage, nor is there any evidence to show that Cheah Siew Yoon (f) the trustee in the management or administration of the infant's land has been embarrassed by any emergency. The property is producing a gross income of $350 per month or $4,200 per year to which the infant would be entitled to $87.50 per month or $1,050 per year. If the property is sold at $35,000 it would give to its purchaser a gross annual return of 12%. What better or safer investment could there be than this?

In cases of a kind like this, I do not think that I have jurisdiction, inherent or statutory, to make the order sought, and to override the express provisions of the trust as contained in the trust deed. Even if I have the jurisdiction I am of the opinion that in the circumstances of this case it would not be expedient nor would it be in the interests of the infant to convert her land into cash.

This application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Manuel & Co.*

CHIEW VUI KIET & ANOR. v. CHONG FOOK TIEN & ORS.

[F.C. (Azmi L.P. Ismail Khan C.J. (Borneo) & Yong J.) June 11, 1971]

[Kota Kinabalu — Federal Court Civil Appeal No. 8 of 1970]

Evidence — Admissibility — Original document not produced — Whether secondary evidence admissible — Presumption — Whether arises where original document is unstamped — Evidence Ordinance (Sabah Cap. 43) ss. 65(a) and 89.

Stamps — Instruments chargeable with duty — No evidence that original was stamped — Payment of duty and penalty insufficient to admit secondary evidence — Stamp Ordinance (Sabah Cap. 137) ss. 47, 52 — Application of.

This was an action claiming an account of a partnership. The first and second respondents denied that they were partners of the firm. The crucial evidence against the first and second respondents was a partnership agreement in Chinese. The evidence showed that the original of this document was unstamped. Despite a notice to produce, the original document was not produced and the appellants produced a photostat copy of the document, which was admitted in evidence. In his judgment, however, the learned trial judge stated that he was wrong in admitting the document and he gave judgment for the first and second respondents. On appeal,

Held, dismissing the appeal: as the original document had not been stamped, no secondary evidence could be offered of its terms. If the copy of the agreement was excluded, there was no evidence to show the partnership of the first and second respondents as partners in the business.

Cases referred to:-

(1) *Closmadeuc* v. *Carrel* 18 C.B. 36, 139 E.R. 1276.

(2) *Marine Investment Company and Coffey & Ors.* v. *T. Snaith Haviside & Anor.* (1871-72) L.R. 5 H.L. 624 at p. 635.

(3) *The Rajah of Bobbili* v. *Inuganti China Sitaramasami Garu,* L.R. (1899) 26 I.A. 262 at p. 266.

(4) *State of Bihar* v. *Karam Chand Thapar & Bros. Ltd.* [1962] 1 S.C.R. 827.

(5) *Murugayya Pillai* v. *Rajagopal Pillai & Ors.* A.I.R. 1942 Mad. 381.

FEDERAL COURT.

K. Raja Nayagam (*W. K. Loo* with him) for the appellants.

Shelley Yap Yeok Siew for respondents Nos. 1-3.
Thomas Jayasuria for respondent No. 4.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): The appellants commenced an action against the respondents claiming an "account of the partnership dealings carried on in the firm name of Yin Nyen Timber Company (hereinafter referred to as Y.N.T. Company) for the period 8th March 1963 to 31st December 1964" and for the dissolution of the partnership.

The first and second respondents denied that they were partners of the firm. The third and fourth respondents admitted that they were partners. The third respondent said he had been manager for a few months when he and first appellant turned over the business to two persons Lai Tet En and Lai Nyen Yu. The fourth respondent denied having any part in the management.

There was a counterclaim by the first respondent for the sum of $320,000 which he as guarantor paid to the Malayan Banking Limited, Sandakan (hereinafter called the bank) for the partnership's overdraft with the bank. The learned trial judge dismissed both the claim and the first respondent's counterclaim. This appeal is against the decision of the learned trial judge in dismissing the claim.

Towards the end of 1961 the first appellant, the holder of a licence to extract timber in the concession at Beaufort, State of Sabah, entered into a partnership agreement with the second appellant and one Lim Choon Yin to carry on the business of timber extraction in the said area. Lim Choon Yin left the partnership after sometime, and sometime in 1962 the third respondent with one Lieu Kai joined the firm. A partnership agreement of the 12th April 1962 was executed (Exhibit P.1). By way of capital the second appellant paid $30,000 and the third respondent, together with Lieu Kai, paid $40,000. The first appellant did not contribute any capital but instead made available his licence for the purpose of the business.

The Y.N.T. Company had no licence to export their timber. Such export was carried out through one Yau Seng. Early in 1963 a company Kwong Fui Loong Ltd. of which the first respondent was the managing director undertook to export timber for the Y.N.T. Company for which a commission was charged.

According to the appellants, sometime in March 1963, it was decided to attract more capital for the business by bringing in more partners. The second appellant went to Sandakan with the third respondent to see the first respondent who appeared to be interested. There a partnership agreement in Chinese (hereinafter called the agreement) was executed whereby the appellants and the respondents became partners in the business. The agreement was prepared by the second appellant obviously without the benefit of legal advice judging from some of the clauses. The English translation thereof reads as follows: —

"PARTNERSHIP AGREEMENT OF YIN NYEN TIMBER COMPANY

Clause 1. The company's name is presently known as Yin Nyen Timber Company and upon approval by the Authorities in future to register as a limited company, it shall be changed to Yin Nyen Company Limited.

Clause 2. The total share capital of the company is $500,000 divided into 100 shares at $5,000 per share.

Clause 3. The shares of the partners are as follows:—

(1) Kwong Yuen Hin Company Limited (i.e., Ho Tain Vun brothers together with Chong Fook Tien brothers) own 40 shares, the share capital should be paid is $200,000.

(2) Mr. Chiew Vui Kiet owns 36 shares (as Mr. Chiew has some other business, Mr. Chong Su Nyen is appointed with full power to deal with this agreement).

(3) Mr. Chong Su Nyen owns 12 shares, the sum of $30,000 share capital has been paid up.

(4) Tain On Hong owns 12 shares the sum of $35,000 share capital has been paid up.

Clause 4. The business of the company is specially to deal in timber (a) now dealing with the reserved land belonging to Jesselton Railways at the Beaufort District from Mile 67½ to Mile 69¼, total area is approximately 3,239 acres; (b) the timber camp of the Railway now in Mr. Chiew Vui Kiet's name shall all be given to this company for extraction until the railway area has been extracted completely.

Clause 8. The offices of the company are distributed as follows:—

(1) Mr. Chong Fook Tien shall be the Managing Director.

(2) Mr. Chiew Vui Kiet shall be the Assistant Managing Director and concurrently to manage all external affairs.

(3) Mr. Ho Tain Vun shall be the General Manager to manage all the affairs of the company concerning productions.

(4) Mr. Chong Fook Siong shall be the technical adviser.

(5) Mr. Chong Su Nyen shall be the treasurer."

I pause to observe that Kwong Yuen Hin Company Limited was not registered as a limited company. It could only be a partnership of which the four respondents appeared to be partners. A firm cannot be a partner in another firm, but the partners could of course be treated as individual partners in the firm Y.N.T. Company. I shall not refer to the other clauses because of the view I have taken as to its admissibility. I shall deal with this matter later.

Coming back to the appellant's story, first appellant had a photostat copy made of the original agreement which was brought to him by the third respondent. It was then returned to the third respondent.

A month later the fourth respondent purchased 20% of the first appellant's share for the sum of $40,000. A document (Exhibit P.3) was drawn up in respect of this transaction. It is significant that although reference was made to the agreement (Exhibit P.1), none was made to the more important agreement. It appears that in December 1963 the management of business was handed over to another firm Kwong Nyen Loong (hereinafter referred to as K.N.L.) who would be responsible for the debts of the Y.N.T. Company. The profits would then be divided between K.N.L. and Y.N.T. Company in the following proportions: 40% to K.N.L.; 60% to Y.N.T. Company. An agreement to that effect was signed by the first appellant and third respondent for Y.N.T. Company and one Lai Tet En and Lai Nyen Yu for K.N.L. This agreement was not produced.

In December 1964 the first appellant surrendered his licence and the partnership thereafter ceased to carry on business.

The bank had extended overdraft facilities to the Y.N.T. Company up to a limit of $50,000. This was increased to over $300,000 and guaranteed by the first respondent. By 31st July 1964 a sum of $389,271.90 cents exclusive of interest was due from the Y.N.T. Company to the bank. Of this sum the first respondent as guarantor paid a sum of $320,000 The bank obtained judgment against the Y.N.T. Company for the balance on their overdraft in the sum of $94,937.28 cents. The appellants and third defendant as partners of Y.N.T. Company were served with judgment debtor summons. It was then that the appellants instituted proceedings against the respondents.

These are some of the facts which I have with difficulty been able to sift from all the muddle and confusion in the evidence.

The agreement was crucial to the appellants' case against the first and second respondents.

The learned trial judge had ruled that it was admissible as secondary evidence of the agreement. This let in a lot of evidence which would have been irrelevant if it were rejected.

In his judgment the learned trial judge said he thought he was wrong in admitting the document. The document, he said, could be used on an undertaking by counsel to have it stamped. Having admitted it he thought the respondents could challenge its reliability and weight. In the end he held that no weight could be placed on it. The main ground of appeal was directed against the finding of the learned trial judge.

As the question of admissibility has been raised, I shall consider the correctness of the learned trial judge's ruling in admitting the document. There is nothing in our law corresponding to section 36 of the Indian Stamp Act 1899 or the English Order 58, rule 10A, to preclude me from doing so.

According to the first appellant he had returned the agreement to the third respondent who said he would give it to the first respondent. In reply to a notice to produce it, first respondent said that there was no such agreement. As there was no evidence that he was last seen with it or that it appeared to have been in his possession, I should have thought that the notice to produce should have been addressed to the third respondent. This point was never argued.

However, early in the examination-in-chief of first appellant his counsel applied to introduce the photostat copy of the agreement. Under section 89 of the Evidence Ordinance, the court shall presume that every document called for and not produced after notice given was attested, stamped and executed in the manner required by law. Under section 65(a) secondary evidence thereof would be admissible.

Counsel for the fourth respondent objected on the ground that the original agreement was unstamped. He referred to section 52 of the Stamp Ordinance, the relevant portion whereof reads: —

"52. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that —

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof under the provisions of section 43 or section 47:

..."

Section 43 does not apply. Section 47 reads:

"47.(1) Save where other express provision is made by this or any other Ordinance, any unstamped on insufficiently stamped instrument... may be stamped after the execution thereof on payment of the unpaid duty, subject as follows: —

(i) where the instrument is presented for stamping within thirty days of its execution if executed within the State of Sabah or within thirty days after it has been first received in the State of Sabah if it has been executed out of the State of Sabah, on payment of the duty only, and no penalty shall be payable;

(ii) in all other cases, there shall be payable in addition to the stamp duty, a penalty of twenty-five dollars or four times the amount of the deficient duty, whichever sum be the greater.

..."

Counsel's arguments as they appear in the learned trial judge's notes are not quite clear. It would appear, however, that counsel for fourth respondent submitted that the agreement could not have been stamped, and counsel for appellants suggested that the defect could be rectified by payment of duty and the penalty.

The learned trial judge then ruled that it was admissible. I think this ruling was premature at that stage as there was some doubt as to the stamping of the agreement. The first appellant should have been questioned on this point as he had a photostat copy made of the original. It was after the admission of Exhibit P.4 that it was elicited from him during his cross-examination that the original bore no stamp.

The relevance of that point is that the presumption under section 89 of the Evidence Ordinance does not arise if there is evidence that the document is unstamped. Once this fact is established the document must be presumed to remain unstamped until the contrary is proved. (See *Closmadeuc* v. *Carrel*[1] and *Marine Investment Company and Coffey & Ors.* v. *T. Snaith Haviside*[2]). In the second case the Lord Chancellor, Lord Hatherley said: —

"I think the authorities go to this extent, that when once you have proved the absence or loss of the stamp, the onus is shifted, and the question must be left to the jury upon the evidence that is produced. And if no evidence is produced, then whatever the consequences may be, you are obliged to retain the conviction that the document was unstamped. And in this case, there being no evidence whatever of the document being stamped, there is nothing to lead us to the inference that it was ever stamped..."

In the instant case there is no evidence that the original had been stamped. It follows, therefore, that no secondary evidence can be offered of its terms even on payment of the duty and penalty, if any, for the provisions of the Stamp Ordinance regarding stamping of a document on payment apply only to the original document *if produced*. (See the Privy Council case *The Rajah of Bobbili* v. *Inugarti China Sitaramasami Garu*[3]). There the appellant offered in evidence in

support of his case a copy of a deed of gift The deed was lost, but it was admitted that it was insufficiently stamped The judges of the High Court (Madras) held that the copy should not be admitted even on payment of a penalty as "the Stamp Act of 1879 prescribes that such payment shall be indorsed on the document and presupposes that the document is forthcoming." On appeal to the Privy Council Lord Watson said: —

"... The only question arising for decision in this appeal is — Whether the courts below were right in holding that the provisions made by the Act of 1879 for the case of deeds either unstamped or insufficiently stamped, have no application when the original deed, which ought to have been stamped or was insufficiently stamped, has not been produced? That is a question which must depend upon the terms of the statute itself.

Their Lordships are satisfied, by an examination of its clauses, that the construction of the Act of 1879 adopted by the court below is correct. These clauses throughout deal with and exclusively refer to the admission as evidence of the original documents which at the time of their execution, were not stamped at all or were insufficiently stamped. It is only upon production of the original writ that the collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must in that case perform by writing an endorsement upon the writ submitted to him, which then, and not till then, becomes probative in law..."

His Lordship then referred to section 33 of the Act, which with some variations that are not material is the same as section 51 of our Stamp Ordinance. There was also a reference to the relevant portion of section 34 of the Act, which is identical with section 52 of our Stamp Ordinance. His Lordship added that the effect of granting the remedy which the appellant maintained he was entitled to would be to add to the Act a provision which it did not contain.

This decision was followed by the Supreme Court of India. (See *State of Bihar* v. *Karam Chand Thapar & Bros. Ltd.*[4]). In the light of the above authorities I hold that Exhibit P.4 was wrongly admitted.

It is true that the collector had certified that no duty was chargeable but this is immaterial as the instrument indorsed was not the original. (See *Murugayya Pillai* v. *Rajagopal Pillai & Ors.*[5]). With the elimination of Exhibit P.4, there is hardly any evidence pointing to the participation of the first and second respondents as partners in the business of the firm (Y.N.T. Company).

The first respondent's involvement in the affairs of the partnership was no more than that of a guarantor of the firm's overdraft with the bank and that of an exporter through his company Kwong Fui Loong Ltd., of the firm's timber. There is evidence that he had increased his guarantee of the overdraft from $50,000 to $320,000, but that was because of the increased commission given him in respect of the export business.

As regards the case against third and fourth respondents, the learned trial judge said that he could rely neither on the evidence of the appellants nor on that of the two respondents. The onus being on the appellants, he therefore held they had failed to discharge it. The learned trial judge had the advantage denied to this court of seeing and hearing the witnesses, and his findings cannot be lightly disturbed. In the unsatisfactory state of the evidence in this case, I cannot see what other conclusion he could have come to.

I observe that in paragraph 11 of their statement of claim the appellants allege that it was the first respondent who had been managing the business at all material times. This paragraph was never amended.

I find no merit in the other grounds of appeal.

The appeal is dismissed with costs.

Azmi L.P.: I agree that the appeal be dismissed with costs and the deposit of $500 will be paid to the respondents towards their taxed costs.

Yong J.: I have had the advantage of reading the judgment of the learned Chief Justice of Borneo and agree to the order proposed by him for reasons as stated therein. I have nothing to add.

Appeal dismissed.

LO SU TSOON TIMBER DEPOT v. SOUTHERN ESTATE SDN. BHD.

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Yong J.) June 11, 1971]

[Kota Kinabalu — Federal Court Civil Appeal No. 93 of 1970]

Contract — Illegality — Agreement assigning rights in a licence for timber extraction — Beach of express condition in licence granted under Forest Rules, 1954, r. 4(1) — Forest Enactment, 1968, ss. 23(a) and 24(1), (6) — Breach of — Effect of.

Practice and Procedure — Whether appellate court can take cognizance of point of illegality raised for the first time on appeal — Observations on.

Forests — Licence — "Personal to holder and shall not be transferable in any manner whatsoever" — Meaning of.

This was an appeal against the judgment of the High Court at Kota Kinabalu whereby the respondents obtained judgment against the appellants in the sum of $255,000. The Forest Officer, Sabah had issued a licence for the extraction of timber to the Beaufort Timber Extraction Co-operative Society. This society appointed Jesselton Development Ltd. as their attorney and the Jesselton Development Ltd. in turn appointed the respondents in their place as attorneys for the licensees. The appellants subsequently entered into an agreement with the respondents, whereby the respondents in effect transferred their rights in the licence to the appellants. In their grounds of appeal, the appellants, *inter alia*, raised for the first time a point of illegality; that the agreement was an assignment of the rights of the licensees under the licence in contravention of an express condition in the licence and was therefore illegal.

Held: allowing the appeal: (1) the agreement in this case was clearly in breach of the provisions of sections 23 and 24 of the Forest Enactment and therefore illegal and any claim based thereon cannot be enforced;

(2) the power of attorney given to the appellants was a colourable device to deceive others into believing that the appellants were operating as agents for the licensees.